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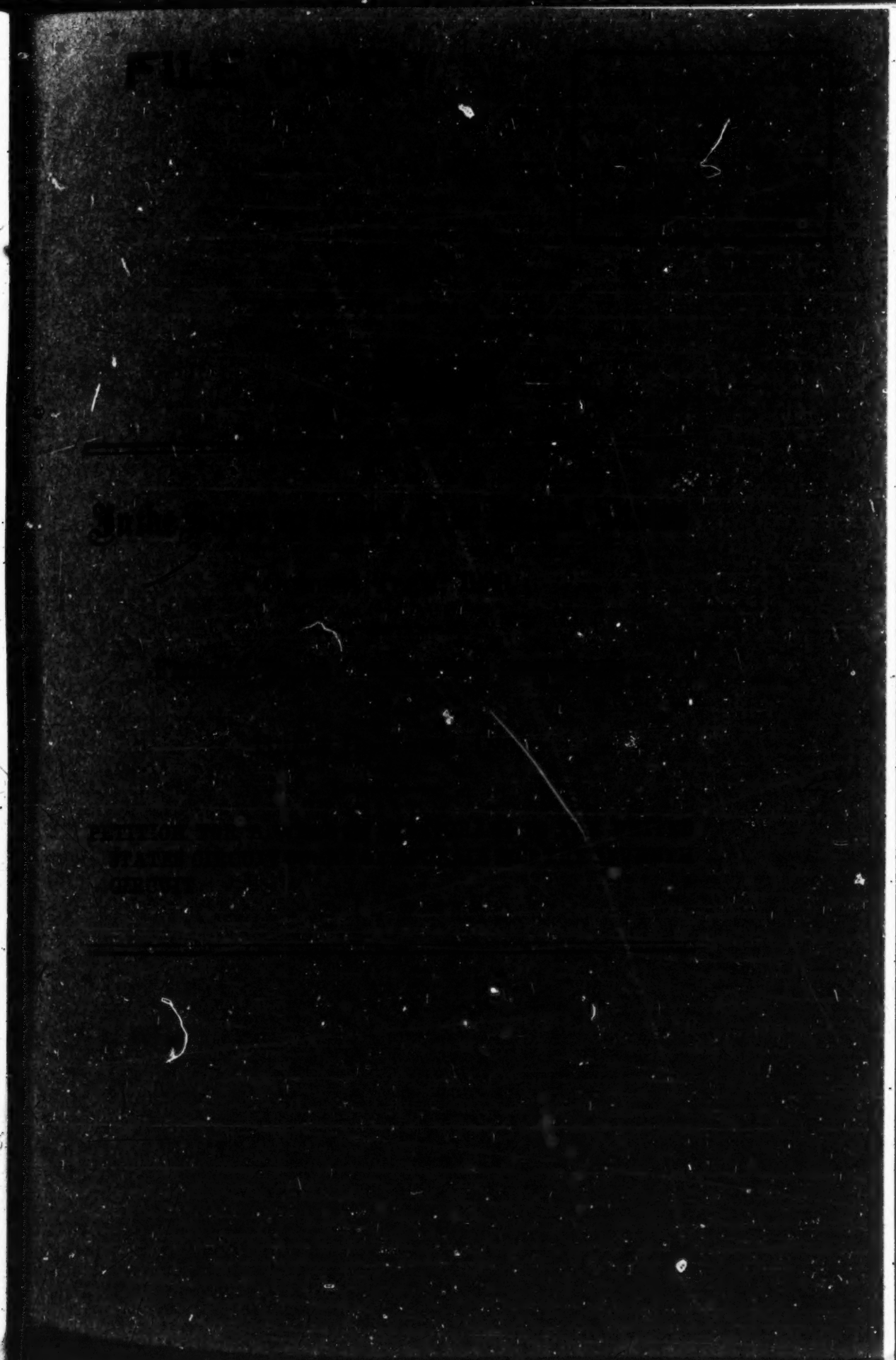

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. ———

FEDERAL TRADE COMMISSION, PETITIONER

v.

BUNTE BROTHERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit entered in this cause on February 20, 1940, which vacated and set aside an order of the Federal Trade Commission requiring the respondent to cease and desist from certain unfair methods of competition in connection with sales in the State of Illinois.

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 321) is reported in 110 F. (2d) 412.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered February 20, 1940 (R. 327). The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act, as amended, U. S. C., Title 15, Section 45, and under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Does the Federal Trade Commission have power to prohibit unfair methods of competition in connection with intrastate sales which reduce the quantity and divert the course of interstate sales and shipments?

STATUTE INVOLVED

The statute involved is the Federal Trade Commission Act, originally enacted September 26, 1914, c. 311, 38 Stat. 717, as amended March 21, 1938, c. 49, 52 Stat. 111, U. S. C. Supp. v, Title 15, Sections 41 *et seq.*[1] The pertinent provisions of the Act are:

> SEC. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:
>
> "Commerce" means commerce among the several States or with foreign nations, or in

[1] This proceeding was instituted by the Commission before, but concluded after the passage of, the amendatory Act on March 21, 1938. The amendments are not pertinent to this proceeding.

any Territory of the United States or in the District of Columbia, or between any such Territory and another or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation;

* * * * * *

SEC. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

Respondent is engaged in the manufacture and sale of candy (R. 311). The candy is sold to wholesalers, jobbers, and retailers (R. 311). Some of it is sold in assortments so arranged that purchasers of pieces having centers of a particular color receive a larger piece of candy or a box of candy in addition to their original purchase without additional charge (R. 312). This method of sale is indistinguishable from that which this Court held unfair in *Federal Trade Commission* v. *Keppel and*

Bro., 291 U. S. 304,[2] and the Circuit Court of Appeals so found.

After this Court decided the *Keppel* case, the Federal Trade Commission instituted a proceeding against respondent and issued an order directing respondent to cease and desist from this method of competition in connection with its interstate sales. This order was affirmed by the Circuit Court of Appeals for the Seventh Circuit. *Bunte Bros., Inc.* v.

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[2] Similar orders of the Federal Trade Commission have since been affirmed by the Circuit Courts of Appeals in 31 cases:

C. C. A. 7th: *Hofeller* v. *F. T. C.*, 82 F. (2d) 647, *certiorari denied*, 299 U. S. 557; *F. T. C.* v. *McLean & Son, a corporation, et al.* (four cases), 84 F. (2d) 910, *certiorari denied*, 299 U. S. 590; *F. T. C.* v. *George Ziegler Co.*, 90 F. (2d) 1007; *F. T. C.* v. *Barager-Webster Co.*, 95 F. (2d) 1000; *F. T. C.* v. *American Candy Co.*, 97 F. (2d) 1001; *Bunte Brothers, Inc.* v. *F. T. C.*, 104 F. (2d) 996; *National Candy Co. et al.* v. *F. T. C.* (3 cases), 104 F. (2d) 999, certiorari denied, 308 U. S. 619.

F. T. C. v. *Charles N. Miller Co.*, 97 F. (2d) 563 (C. C. A. 1); *F. T. C.* v. *Leader Novelty Candy Co.*, 92 F. (2d) 1002 (C. C. A. 2); *F. T. C.* v. *Rittenhouse Candy Co.*, decree Jan. 5, 1938, not reported (C. C. A. 3); *Minter et al.* v. *F. T. C.*, 102 F. (2d) 69 (C. C. A. 3); *F. T. C.* v. *Southern Premium Mfg. Co.*, 83 F. (2d) 1008 (C. C. A. 5); *F. T. C.* v. *H. I. Sifers*, 84 F. (2d) 999, motion to modify, overruled Jan. 23, 1937 (C. C. A. 8); *F. T. C.* v. *F. A. Martoccio Co.*, 87 F. (2d) 561 (C. C. A. 8), *certiorari denied*, 301 U. S. 691; *F. T. C.* v. *Chase Candy Co.*, 97 F. (2d) 1002 (C. C. A. 8); *Helen Ardelle, Inc., Brown & Haley, Canterbury Candy Makers, Inc., Imperial Candy Co., and Rogers Candy Co.* v. *F. T. C.*, 101 F. (2d) 718 (C. C. A. 9); *F. T. C.* v. *Brecht Candy Co., Cosner Candy Co., Savage Candy Co.*, 92 F. (2d) 1002, 1003 (C. C. A. 10); *Ostler Candy Co. et al.* v. *F. T. C.* (three cases), 106 F. (2d) 962 (C. C. A. 10).

Federal Trade Commission, 104 F. (2d) 996. The present proceeding involves the same practices in connection with intrastate sales in Illinois.

The complaint charged (R. 18–19) and the Commission found (R. 314–317) that the use of this method of competition in Illinois diverted trade from competitors outside Illinois who did not use the chance method of selling and who would otherwise have made sales in interstate commerce to Illinois purchasers. The business of competitors who were selling "straight" candies in interstate commerce into Illinois was reduced both because chance assortments were often preferred to straight goods and because many persons preferred to buy both their straight and chance assortments from a single salesman or in a single shipment and accordingly purchased only from jobbers who sold both kinds of assortments (R. 314–317). The Commission's order required respondent to cease and desist from selling chance assortments in the State of Illinois (R. 317–318).

The Circuit Court of Appeals set aside this order on the ground that under the statute the Commission's power extended only to practices *in* interstate commerce and not to those which affected interstate commerce (R. 326). It admitted that this conclusion was "not free from doubt" (R. 327). The Court of Appeals characterized respondent's methods of competition as "unfair" and "unethical" (R. 326). Although respondent contended that application of the Act to its intrastate sales

would be unconstitutional, the Court did not suggest that the Federal Government lacked constitutional power under the commerce clause to reach intrastate acts of the kind here in question.

SPECIFICATION OF ERROR TO BE URGED

The Court below erred in holding that the Federal Trade Commission has no power to prohibit unfair practices in connection with intrastate sales which divert and reduce the amount of interstate sales by competitors who do not engage in such practices.

REASONS FOR GRANTING THE WRIT

1. The question involved is one of public importance which should be decided by this Court. The Federal Trade Commission Act was intended to protect all interstate competition from the evils of unfair practices. *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 647–648. The transactions prohibited by the Commission's order in this case were consummated within the boundaries of a single state, but they were carried on in direct competition with other transactions consummated across state lines. Thus the competition which the Commission was attempting to control was essentially interstate in character. The decision below denies to the Commission the power to deal with unfair practices of this kind. Its effect is to put interstate commerce at the mercy of intrastate competitors who engage in unfair practices. If the decision is correct, the power of the Commission

to protect interstate commerce and those engaged therein from unfair and discriminatory practices by competitors is severely limited. The question thus is one of first importance in the administration of the Federal Trade Commission Act and warrants an authoritative decision by this Court.

2. The decision below is in conflict with other decisions in the Circuit Courts of Appeals, which have construed the Federal Trade Commission Act as applying to intrastate transactions which affect interstate commerce or which occur in the current of interstate competition. In *National Harness Mfrs.' Ass'n* v. *Federal Trade Commission,* 268 Fed. 705, 709, the Circuit Court of Appeals for the Sixth Circuit stated:

> The contention that the Harness Manufacturers' Association is not engaged in commerce is answered by the consideration, first, that many of its members are so engaged; and, *second, that interstate commerce is claimed to have been directly affected by the alleged unfair methods of competition.* [Italics supplied.]

In *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 F. (2d) 673, 684, the Circuit Court of Appeals for the Eighth Circuit, rejecting attacks on the Commission's jurisdiction, declared:

* * * * *

> A second ground is that the Chamber is not engaged in interstate commerce. * * * Although the Chamber *is not itself engaged*

> *in any commerce* in the sense of being a trader or shipper, yet it is an instrumentality in the current of interstate commerce *which directly affects such commerce* and is within the regulatory power of Congress. * * *
>
> A third ground is that any effect of the rules of the Chamber upon interstate commerce is indirect, therefore, regulation of such Chamber is a matter for state action in the absence of congressional regulation. This may be true as a broad general statement. * * * *But Congress, in the Federal Trade Commission Act, has assumed to legislate concerning "unfair methods of competition" affecting interstate commerce and if any action by or any rule or regulation of the Chamber has that effect it is certainly subject to that act,* no matter what the state has or has not authorized or permitted in that respect. [Italics supplied.]

The position taken by the court below is supported by a recent decision in the Court of Appeals for the Ninth Circuit. *California Rice Industry* v. *Federal Trade Commission,* 102 F. (2d) 716, 723, Because of the conflicting views of the various circuit courts of appeals as to the scope of the Act, the question here involved should be resolved by this Court.

3. The decision below is inconsistent with decisions construing other statutory provisions designed to protect interstate commerce from unfair and discriminatory practices.

For example, in the *Shreveport Case* (*Houston & Texas Ry.* v. *United States*), 234 U. S. 342, this Court held that the Interstate Commerce Commission had statutory authority to regulate intrastate rates which discriminated against interstate commerce.[3] Section 3 of the Act to Regulate Commerce (24 Stat. 379, 380, 41 Stat. 479, U. S. C., Title 49, Sec. 3) made it unlawful for any carrier to give any undue or unreasonable preference or advantage to one shipper or description of traffic over another. A proviso in Section 1 of the Act (24 Stat. 379, 34 Stat. 584, 36 Stat. 545, 41 Stat. 474, U. S. C., Title 49, Sec. 1 (2)) stated:

> *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property * * * wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid * * *.

In the *Shreveport Case,* it was shown that lower intrastate rates discriminated against interstate shipments by giving to intrastate shippers an important preferential advantage—a situation substantially identical with that in the case at bar. This Court held that the proviso of Section 1 was inapplicable, saying (234 U. S. at 358–359):

> The Commission was dealing with the relation of rates injuriously affecting,

[3] The case arose in 1911, before this authority was expressly conferred upon the Commission by the Transportation Act of 1920, c. 91, 41 Stat. 484, U. S. C., Title 49, Section 13 (4).

> through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was "wholly within one State." These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation.

The same considerations of policy, statutory purpose and constitutional power apply *a fortiori* in the present case, for the broad phrase "competition in commerce" is found in the Federal Trade Commission Act without any express limitation exempting, as in the *Shreveport Case,* activities "wholly within one State."

A similar construction was given to Section 2 of the Clayton Act (38 Stat. 730, U. S. C., Title 15, Sec. 13), which prohibits certain price discrim-

inations "in the course of [interstate] commerce". *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th), certiorari denied, 282 U. S. 899. The defendant sold cans intrastate [4] to the Van Camp Company at a price lower than to the plaintiff, Ladoga Canning Co. As a result Van Camp was able to sell its food products in interstate commerce at lower prices than Ladoga. The court held that the Act applied to defendant's intrastate sales because of their effect upon interstate competition.

The Federal Trade Commission Act was passed in order to supplement and strengthen the regulation of monopolies and restraints of trade embodied in the Sherman Act.[5] S. Rept. No. 597, 63d Cong., 2d Sess.; H. Rept. No. 1142, 63d Cong., 2d Sess., pp. 18–19; *Federal Trade Commission* v. *Raladam Co., supra,* 650; *Federal Trade Commission* v. *Keppel & Bro., supra; Federal Trade Commission* v.

[4] 99% of the sales were intrastate. 44 F. (2d) at 770.

[5] Contemporaneous lists of practices which would come within the statutory proscription of unfair methods were comprised almost entirely of practices conducive to monopoly. See H. Rept. No. 533, Part 3, 63d Cong., 2d Sess., pp. 19–20 (minority views); Letter from the Commissioner of Corporations to the Chairman of the Committee on Interstate Commerce transmitting certain suggestions relative to the bill (H. R. 15613) to create a Federal Trade Commission, 63d Cong., 2d Sess., p. 16; William S. Stevens, *Unfair Competition*, 29 Political Science Quarterly 282, 460. This Court discussed at length the relationship between the Sherman Act and the Federal Trade Commission Act in the *Raladam* case (283 U. S., at 650).

Beech-Nut Packing Company, 257 U. S. 441. In the *Keppel* case this Court said (291 U. S. at 310): "The Act undoubtedly was aimed at all the familiar methods of law violation which prosecutions under the Sherman Act had disclosed." That the Sherman Act prohibited restraints and practices intrastate in nature because of their effect upon interstate commerce was well established at the time the Federal Trade Commission Act was enacted.[6] The Federal Trade Commission Act would not have been an effective instrument for the enforcement of the Antitrust Act if it had been narrower in scope than the statute which it was designed to supplement.

The debates in Congress in connection with the definition of commerce in the Trade Commission Act also demonstrate that Congress intended that statute, like the Sherman Act, to go to the limits of the federal commerce power, at least within the continental United States. The bill as originally introduced (H. R. 15613) defined commerce as meaning "such commerce as Congress has power to regulate under the Constitution." 51 Cong. Rec. 8844–8845; S. Rept. No. 597, 63d Cong., 2d Sess., p. 1. The conference committee changed this definition to that finally adopted (*supra*, pp. 2–3.

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[6] *Swift & Co.* v. *United States*, 196 U. S. 375; *Northern Securities Company* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Patten*, 226 U. S. 525. Cf. *Standard Oil Co. (Indiana)* v. *United States*, 283 U. S. 163; *Local 167* v. *United States*, 291 U. S. 293.

The debate shows that the only reason for the change was "to exclude commerce with any possessions of the United States that were not States or Territories or the District of Columbia," that is, the Philippines, the Canal Zone, Porto Rico, and Guam. 51 Cong. Rec. 14927, 14935.[7] The clear inference is that Congress intended to subject to the

---

[7] The following colloquy explains the reason for the above change (51 Cong. Rec. 14935):

"Mr. WILLIS. * * * I wish to ask the gentleman a question about the definition of commerce. The gentleman will recall in the bill as passed by the House that commerce was defined as all 'such commerce as Congress has power to regulate under the Constitution.' The Senate bill has the same definition.

* * * * *

"I am wondering what the reason was that led the conferees to provide in the conference agreement that the word 'commerce' should be so defined as to exclude from the operations of the act commerce with the Canal Zone, Porto Rico, Guam, and the Philippines, yet at the same time including commerce with Alaska and Hawaii. No reason has been given by anyone for this distinction.

"Mr. STEVENS of Minnesota. * * * The reason was that we did not think that the scope of the commission should be extended that far, to embrace our foreign possessions. That conditions there are so different than here that they could be handled by local authorities better than by a commission 7,000 miles away in the city of Washington. If the scope of the commission needs to be extended hereafter to any of them, it can be done, but at present we thought it would hamper rather than to help business there and here. The commission should have enough to do here in the United States."

Act all commerce which it had power to regulate under the Constitution except in certain of the outlying possessions.[8]

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

FRANCIS BIDDLE,
Solicitor General.

MAY 1940.

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[8] This inference is not negatived by the fact that in 1935 it was proposed that the Act be amended so as to apply to practices "in or affecting" commerce. S. 944, 74th Cong., 1st Sess. The purpose of the proposed amendment, which passed the Senate but was reconsidered on objection that its application to intrastate matters might be too broad (79 Cong. Rec. 1842–1844), was to remove doubts as to the meaning of the statute. (S. Rept. No. 46, 74th Cong., 1st Sess.) Although the words "or affecting" were not included in the amendment finally adopted in 1938 (52 Stat. 111), there is no indication of any intention that the law should have a more restricted application than was desired by the Congress which enacted it.

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